SUBJECT INDEX

	Page
Petitioner's Reply to Memorandum for the United States in Opposition	1
Conclusion	4

TABLE OF AUTHORITIES CITED

Cases

Catlin v. United States, 324 U.S. 229, 89 L.Ed. 911 (1945)	2
Haynes v. United States, 390 U.S. 85, 19 L.Ed.2d 923 (1968)	2
United States v. Koenig, 290 F.2d 166 (1961)	2

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-908

ROBERT E. COTE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petitioner's Reply to Memorandum for the United States in Opposition.

Petitioner urges this Honorable Court to note that even prior to arraignment Petitioner raised the issue of the unconstitutionality of subject section upon its face (See Appendix, p. 160). Thereafter Petitioner continued to raise this issue and specifically set forth this question upon Petitioner's original Brief dated October 30, 1972 as Issues IA and IB. Petitioner had exhausted every available procedural remedy to demonstrate to the Trial Court prior to trial that under the then prevailing law the subject materials were not obscene as a matter of law.

1. Petitioner submitted materials to the Trial Court, all comparable to the subject materials and all of which had prior to that time been held by this Honorable Court to be not obscene as a matter of law (See Appendix, pp. 168-241).

2. Petitioner filed a Pre-trial Motion to dismiss predicated upon the earlier opinions of this Honorable Court relating to the comparable materials and argued the motion (See Appendix, pp. 26-115, and 168-241).

3. Petitioner requested findings when the Trial Court denied the Pre-trial Motion. The Trial Court refused to submit findings (See Appendix, pp. 114-115).

4. Petitioner then filed Petition for Writ of Mandamus and a separate Petition for Writ of Prohibition (See Appendix, p. 116).

At this point the denial of the Pre-trial Motion was not a final decision, but only interlocutory in nature and therefore nonappealable. (*Catlin v. United States,* 324 U.S. 229, 236; 89 L.Ed. 911, 917-918 (1945); *United States v. Koenig,* 290 F.2d 166, 169 (1961).)

Petitioner had therefore incorporated the Pre-trial Motion into his plea by his announced decision to raise upon appeal the question of law relating to the alleged obscenity, and by the introduction into evidence at that time all government and defense exhibits including all comparable materials that Petitioner had submitted to the Trial Court at the time of the Pre-trial Motion. In effect, therefore, Petitioner, just as the petitioner in *Haynes v. United States,* 390 U.S. 85, 19 L.Ed.2d at 923 (1968), seeks review of the lower court's decision denying the Pre-trial Motion. The procedure here is, therefore, parallel to the procedural aspects in *Haynes.*

Petitioner is urging respectfully, therefore, that under pre-*Miller* standards the subject materials were not obscene as a matter of law and should therefore be entitled to a decision accordingly.

Further Petitioner has urged upon this Petition that the Trial Court could not have jurisdiction to proceed

if it had been demonstrated, as it clearly was, that the subject materials were not obscene as a matter of law under pre-*Miller* standards.

When this Honorable Court on June 25, 1973 granted the first Petition for Writ of Certiorari, vacated the judgment, and remanded to the Court of Appeals for further consideration in light of *Miller*, an additional question was then raised as to whether or not Section 1461 under pre-*Miller* standards could have been constitutional in any event. Petitioner here urges this Honorable Court that Section 1461 under pre-*Miller* standards was constitutionally defective at the time the original indictment was brought, and therefore for that reason there was a second ground why the Trial Court did not have jurisdiction to proceed.

In all events if the issues as heretofore set forth are ruled upon adversely to Petitioner there still remains a critical question to be answered. Since the case was remanded for further consideration in light of *Miller*, the question then becomes whether or not a Lower Court may reach a determination that the subject materials are obscene without any shred of evidence whatsoever. At the time that Petitioner entered his plea he could not have been aware that this Honorable Court would have reached the determination that it did in the *Miller* case. If would appear, therefore, to be proper within the concept of Due Process that prior to a Lower Court making a determination on the matter of obscenity there be evidence taken with respect to the new standards set forth in the *Miller* decision. There was no evidence whatsoever taken. For that reason Petitioner urges respectfully that the Lower Court erred in making its determination that the subject materials were obscene under the *Miller* definition.

Petitioner further respectfully suggests that other cases now pending before this Honorable Court also relating to Section 1461 may have a bearing upon the issues presented in this Petition.

Conclusion.

For the foregoing reasons a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Dated: April 4, 1974.

Respectfully submitted,

GEORGE GROVE, JR.,
Attorney for Petitioner.